Supreme Court, U.S.
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In The

Supreme Court of the United States

JACK COMBS,

Petitioner,

v.

FAIR HOUSING OF MARIN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL K. JOHNSON
Counsel of Record
LEWIS BRISBOIS BISGAARD & SMITH LLP
One Sansome Street, Suite 1400
San Francisco, CA 94104
Telephone: 415-362-2580

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

86PP

QUESTIONS PRESENTED FOR REVIEW

1. Whether a fair housing organization has established "injury in fact" sufficient for first party standing under Article III of the Constitution by proof that it voluntarily allocated some of its resources to investigate a housing provider, where there is no evidence that the housing provider's alleged misconduct had any effect on the organization's activities other than the allocation of resources to the investigation.

2. Whether a fair housing organization has established "injury in fact" sufficient for first party standing under Article III of the Constitution by proof that it voluntarily allocated some of its resources to pursue litigation against a housing provider, where there is no evidence that the housing provider's alleged misconduct had any effect on the organization's activities other than the allocation of resources to the litigation.

3. Whether a fair housing organization has established the second element of the Constitutional minima for standing, causation, by proof that it voluntarily diverted resources toward investigation or litigation against a housing provider, in response to complaints by a third party, where there is no evidence that the housing provider's alleged misconduct had any effect on the organization's activities other than the allocation of resources to the investigation or litigation.

PARTIES TO THE PROCEEDING

The parties to this proceeding are all identified in the caption of this petition.

The Petitioner is Mr. Jack Combs, an individual, formerly doing business as Water's Edge Apartments.

The Respondent is Fair Housing of Marin, a California non-profit corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jack Combs, formerly doing business as Waters Edge Apartments, respectfully prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's opinion affirming the judgment against petitioner is published at 285 F.3d 899 (9th Cir. 2002) and also reported at 2002 U.S. App. LEXIS 6494. (App. 1-17.)

The district court's opinions are not published. However, the district court's order entering default judgment and awarding compensatory and punitive damages filed March 29, 2000 (App. 29-42), is available at 2000 U.S. Dist. LEXIS 4737.

STATEMENT OF JURISDICTION

The decision sought to be reviewed was entered April 9, 2002 (App. 1, 46), and a timely petition for rehearing was denied on June 4, 2002. (App. 45.)

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

This case concerns Article III, section 2 of the United States Constitution, the Case or Controversy clause, which provides in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . .

42 U.S.C. § 3613(a)(1)(A) [formerly section 3612] provides in pertinent part:

> An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than two years after the occurrence or the termination of an alleged discriminatory housing practice . . . to obtain appropriate relief with respect to such discriminatory housing practice or breach.

42 U.S.C. § 3602(i) defines the term "aggrieved person" as follows:

> (i) "Aggrieved person" includes any person who –
>
> 1. claims to have been injured by a discriminatory housing practice; or
>
> 2. believes that such person will be injured by a discriminatory housing practice that is about to occur.

STATEMENT OF THE CASE

1. Summary of the Case

This action was filed by Fair Housing of Marin ("FHOM"), a California non-profit corporation that was formed for the purpose of promoting equal opportunity in housing and eliminating illegal housing discrimination. There are no other party plaintiffs. FHOM's complaint alleges that Petitioner, Jack Combs, discriminated against African Americans at Waters Edge Apartments, an 18-unit apartment building that Mr. Combs formerly owned in San Rafael, California. Mr. Combs strongly denies that he ever discriminated against African Americans. The district court had original jurisdiction over this matter under 28 U.S.C. § 1331.

Mr. Combs contends that FHOM lacks standing under Article III of the Constitution to bring this case in its own right because FHOM did not experience any "injury in fact" that was caused by Mr. Combs' alleged misconduct. FHOM claims it has standing to sue Mr. Combs because it "diverted resources" from its programs in order to investigate Mr. Combs and prosecute this lawsuit, and because in the future it might conduct outreach to counteract the alleged discrimination. However, there is no dispute that FHOM's "injuries" are self-inflicted – there is no evidence that FHOM's activities were affected in any way by Mr. Combs' alleged conduct other than the allocation of resources to the investigation and litigation. FHOM was under no legal or other compulsion to investigate or counteract Mr. Combs' alleged misconduct. FHOM voluntarily undertook these efforts. Indeed, FHOM's mission and purpose include investigation of complaints, outreach and counseling, and prosecution of litigation, and it is

funded (with grants from HUD and other sources) for these very purposes.[1]

The alleged "injury" asserted by FHOM does not establish standing under Article III. This Court has held that in order to have standing, the plaintiff must have suffered an "*injury in fact*" which is defined as "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotes and citations omitted). Moreover, there must be a causal connection between the injury and the conduct complained of. *Id.* Voluntary decisions by an organization to investigate complaints or to pursue litigation do not satisfy this test when the organization's activities are otherwise unaffected by the defendant's conduct.

There is a deep rift among the Circuit Courts on this issue. The seminal case, *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) held that a fair housing organization has standing to proceed beyond the pleadings stage if the complaint alleges that the defendant's misconduct "injured" or "impaired" the organization's ability to do its work. Subsequent decisions from the Courts of Appeals are significantly conflicted as to whether an organization's own voluntary expenditure of assets for investigation or litigation constitutes injury or impairment for purposes of standing in the absence of any other injury or impairment

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[1] FHOM received grants totaling $304,304 for the 18 month period ending June 30, 1996, out of total revenues of $360,721. (RFGN, Exh. E, p. 363.)

to the organization's activity. This conflict has resulted in a great deal of unnecessary litigation, as well as general uncertainty regarding the law in this area.

2. Procedural History

FHOM is a California non-profit corporation that was formed for the purpose and with the goal of promoting equal opportunity in housing and elimination of all forms of illegal housing discrimination. To this end, FHOM investigates allegations of discrimination, conducts tests to determine whether equal opportunity in housing is provided, provides outreach and education, and takes steps to assure equal opportunity in housing, including filing lawsuits such as this one.

In 1994, FHOM received complaints of discrimination at Waters Edge Apartments. Mr. Combs contends these complaints were false and fraudulent. In response, FHOM conducted tests at Waters Edge with fair housing testers. FHOM then filed an administrative complaint against Mr. Combs. In January 1997, FHOM withdrew the administrative complaint,[2] and several months later filed this civil

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[2] The reason for the withdrawl is apparent from the lead agency's (DFEH) file. On January 10, 1997, there was a meeting between DFEH's staff counsel and district administrator, and a note from this meeting states: "**[DFEH's] complaint was based on one pair of rental testing conducted on 5/16/95 and the testing was inconclusive. In addition, the tester's profile shows that the African-American tester was not discriminated [against] during the application process. Counsel Bass agreed that since no one was subject to any harm, complainant has no standing to file.**" (RFJN, Exh. B, p. 12 [emphasis added].) FHOM's motivation for withdrawing the administrative complaint is obvious – they were

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action. In its complaint, FHOM alleges that Mr. Combs discriminated against African Americans, and, as is typical in these suits, FHOM's complaint alleges that ***it*** was injured by Mr. Combs' alleged discriminatory misconduct:

> By reason of the defendant's unlawful acts and practices, FHOM has suffered injury to its ability to carry out its purposes and to serve the public in its effort to eliminate housing discrimination, to resolve fair housing disputes, to find and to make available decent rental housing to persons regardless of race or color, and to assure rights to the important social, professional, business, economic, and political benefits of associations that arise from living in a community integrated with African Americans. The defendant's unlawful acts and practices have caused FHOM to suffer economic losses in staff pay, in funds expended in support of volunteer services, and in the inability to undertake other efforts to end unlawful housing practices. (ER 5.)

In response to the complaint, Mr. Combs filed a motion to dismiss on the ground that FHOM lacks standing. Relying on the language of FHOM's complaint and the *Havens Realty* decision, the district court denied Mr. Comb's motion to dismiss. (App. 18.)

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concerned that an adverse administrative decision was imminent, and they felt they would be in a better position to obtain a settlement if they filed a lawsuit. FHOM's Executive Director, Nancy Kenyon, admitted that they withdrew the complaint because their discussions with the agency "caused us to believe that they were not doing a good job investigating the complaint and had not made any progress in mediating a settlement." (ER 155.)

After a series of discovery motions, on the eve of trial the district court granted a motion for terminating sanctions against Mr. Combs based on alleged discovery abuses, and a default judgment and award of compensatory and punitive damages was made. (App. 29.)[3] In its application for the default judgment, FHOM claimed two kinds of damages: (1) *diversion of resources* "caused by the diversion of Fair Housing of Marin's resources away from its educational programs, counseling, and its other programs and activities to the investigation of defendant's housing practices" and (2) *frustration of mission*, or FHOM's non-economic interest in ensuring equal housing. FHOM asked for $16,317 for its alleged diversion of resources and $34,500 for its alleged frustration of mission.

FHOM calculated its alleged damages for diversion of resources by adding up all of its staff time and costs relating to Water Edge Apartments, including intake of complaints, testing, prosecution of the administrative action, and prosecution of this lawsuit. FHOM also claimed $3,240 for participating in local advocacy groups. The evidence supporting these damages was a written declaration from FHOM's Executive Director, Nancy Kenyon. Ms.

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[3] As part of the terminating sanction, Mr. Combs' answer was stricken, so far purposes of FHOM's motion for default judgment, the factual allegations regarding liability in FHOM's complaint were accepted by the district court as true. However, the district court correctly recognized that FHOM's allegations regarding damages were *not* to be taken as true (see *Geddes v. United Financial Group*, 559 F.2d 557, 560 (9th Cir. 1977) (citing *Pope v. United States*, 323 U.S. 1, 12 (1944)), so the district court made particularized findings as to the nature and amount of FHOM's damages. (App. 34-38.)

Kenyon declared that it was her understanding FHOM's diversion of resources damages consist of "the harm caused by the diversion of Fair Housing of Marin's resources away from its other programs and activities to the investigation of defendant's housing practices . . . or the activities that [FHOM] had to forego to address defendant's actions." (ER 155-156.) There was no evidence that these resources were expended based on any real or threatened injury to FHOM itself.

Under the "frustration of mission" category, FHOM claimed anticipated future costs of $8,100 to "test and monitor the defendant's housing practices in the next three years." FHOM also claimed $26,400 for future "outreach" to counteract the effect of Mr. Combs' alleged discrimination. Again, the evidence supporting this claim was a declaration by FHOM's director, Ms. Kenyon. Ms. Kenyon's declaration in support of this claim is speculative. She stated that this "outreach" was necessary "to locate people who **may** have been affected by the defendant's discrimination and counsel them that discrimination, based on race is illegal." (ER 165 [emphasis added].) Again, there was no evidence that the outreach was intended to counteract the effect of the alleged discrimination on FHOM.

In its order entering default judgment, the District Court granted plaintiff all of its claimed "diversion of resources" damages, except the Court refused to allow FHOM to recover the cost of participating in the Marin Roundtable of Hate Violence (a reduction of $2,100). (App. 34-36.) Regarding the "frustration of mission" damages, the court granted FHOM $10,160 for future "outreach." (App. 36-38.) The Court refused to allow FHOM to recover the cost of future training, supervision, or monitoring,

because Mr. Combs had sold Waters Edge Apartments. (App. 37.) The court's award of compensatory damages totaled $24,377. The district court awarded $74,400 in punitive damages against Mr. Combs. (App. 38-40.) Later, FHOM was awarded attorneys fees at trial in excess of $500,000.

On appeal, in a decision of first impression in the Ninth Circuit, the Court of Appeals allied itself with the courts that have taken the most liberal interpretation of *Havens Realty*. Relying on the district court's findings, which the Court of Appeals found (without discussion) to be supported by the record, the Court held that "Fair Housing of Marin has direct standing to sue because it showed a drain on its resources from both a diversion of its resources and frustration of its mission." (App. 9.) The Court's opinion fails to address the fundamental issue of whether a fair housing organization's voluntary allocation or expenditure of its resources constitutes "injury in fact" for the purpose of standing in the absence of evidence of any other injury or impairment of the organization's activities. Mr. Combs requests that this Court now take up this issue.

REASONS FOR ALLOWANCE OF THE WRIT

There Is a Significant Conflict among the Circuits. This petition should be granted because the Circuit Courts are divided as to whether a fair housing organization's voluntary decision to allocate or expend resources for investigation or litigation is sufficient to create standing *in the absence of any other evidence of injury or impairment of the organization's activities*. The split centers around

language from *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

This issue is significant and recurring. As a result of the split of authority, there is uncertainty in the law of organizational standing, and a great deal of resources by both litigants and the courts are being spent litigating this issue. This is detrimental to fair housing organizations, housing providers, and the public. An amicus brief submitted in this case by over 20 fair housing organizations in support of FHOM complains that housing providers have "converted the issue of fair housing organization standing into a cottage industry of satellite litigation within fair housing cases." Amici argued (and Mr. Combs agrees) that clarifying the standing issue will achieve judicial economy, reduce the cost of litigation for the parties, and serve the public interest by clarifying the expectations of parties, thus facilitating early resolution of these cases. Therefore Mr. Combs requests that the Court grant this petition.

A. The Constitutional Minimum for Standing

The threshold question in every federal case is whether the court has the power to entertain the suit:

> In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III. . . . As an aspect of justiciability, the standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf.

Warth v. Seldin, 422 U.S. 490, 498-499 (1975).

The "irreducible constitutional minimum" for standing under Article III contains three elements: ***First***, the plaintiff must have suffered an "*injury in fact*," which the Court has defined as "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotes and citations omitted). To be "particularized," an injury must affect the plaintiff "in a personal and individual way." *Id.* at 560 n.1. ***Second***, there must be a causal connection between the injury and the conduct complained of. In other words, the injury has to be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Id.* (internal punctuation omitted). ***Third***, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Id.* at 561. See also, *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472-476 (1982) (discussing the purpose of the Constitutional minima for standing).

At each stage of the proceedings, the plaintiff is required to state facts and submit evidence commensurate with its burden of proving that it has standing.

> Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.

Lujan v. Defenders of Wildlife, 504 U.S. at 561 (internal citation omitted). See also, *Havens Realty*, 455 U.S. at 379 n.21.

This case involves both the injury in fact and the causation elements, because the injury claimed by FHOM is neither "injury in fact" nor was it caused by Mr. Combs.

B. The Source of the Conflict – *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982)

In *Havens Realty*, a non-profit corporation called Housing Opportunities Made Equal (HOME) and three individuals sued Havens Realty Corp., which owned and operated two apartment complexes in a suburb of Richmond, Virginia. The complaint alleged that Havens Realty engaged in the practice of illegally steering African American renters from an apartment complex predominantly occupied by whites to an adjoining complex that was integrated. *Id.* at 368 n.4. The complaint alleged that HOME had been injured because Havens Realty's racial steering "frustrated" HOME's efforts to assure equal access to housing through counseling and other referral services. HOME also alleged that it "had to devote significant resources to identify and counteract the defendant's [sic] racially discriminatory steering practices." *Id.* at 379. Havens Realty filed a motion to dismiss the complaint on the ground that HOME lacked standing. The district court dismissed the complaint as to HOME on that ground. The Fifth Circuit Court of Appeals reversed, and the Supreme Court granted certiorari. HOME's standing was a key issue addressed by the Court.[4]

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[4] Initially, the Supreme Court held that Congress intended standing under Section 812 of the Fair Housing Act (42 U.S.C. §3612, now renumbered as §3613) to extend to the full limits of Article III of the Constitution. *Id.* at 372 (citing *Warth v. Seldin*, 422 U.S. at 501).

(Continued on following page)

Because the case was an appeal from a successful motion to dismiss, the Court was required to accept the allegations of the complaint as true, and broadly interpret the complaint in favor of the plaintiff. See *Warth v. Seldin*, 422 U.S. at 501. The Supreme Court thus accepted HOME's allegations "as broadly alleged," and concluded that HOME had standing *at that stage of the proceeding* based on HOME's broadly alleged "allegations of injury." *Havens Realty*, 455 U.S. at 379. The pertinent language from the decision deserves full quotation, because it has been the source of confusion among the lower courts:

> In the instant case, HOME's complaint contains the following claims of injury to the organization:
>
> > "Plaintiff HOME has been frustrated by defendants' racial steering practices in its efforts to assist equal access to housing through counseling and other referral services. Plaintiff HOME has had to devote significant resources to identify and counteract the defendant's [sic] racially discriminatory steering practices." [Citation to record omitted.]
>
> If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income home seekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities – with the consequent drain on the organization's

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Thus, the courts lack authority to create "prudential barriers" to standing in suits under the Act.

> resources – constitutes far more than simply a setback to the organization's abstract social interests, see *Sierra Club v. Morton*, 405 U.S., at 739, 92 S.Ct., at 1368. We therefore conclude, as did the Court of Appeals, that in view of HOME's allegations of injury it was improper for the District Court to dismiss for lack of standing the claims of the organization in its own right.

Havens Realty, 455 U.S. at 379 (footnotes 20 and 21 omitted).

It is apparent from this language that the touchstone of the Court's analysis of standing is *injury* or *impairment* to the organization's activities as the result of defendant's conduct. In the quoted portion above and in footnotes 20 and 21 of its decision, the Court uses the terms "injury" and "impairment" no less than seven times. The Court never states that "diversion of resources" or "frustration of mission" necessarily gives rise to standing in the absence of any other impact on the organization's activity. [4] However, some courts have interpreted the decision to mean that a diversion of resources to investigate complaints or pursue litigation against a landlord, or frustration of mission resulting from the diversion, themselves constitute "injury in fact" sufficient to establish standing. (See section C, *infra*.)

Mr. Combs submits that the *Havens Realty* case does *not* hold that a diversion of resources alone necessarily

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[4] See *Association of Community Organizations v. Fowler*, 178 F.3d 350, 361 n.7 (5th Cir. 1999); *Fair Employ. Council v. BMC Marketing Corp.*, 28 F.3d 1268, 1277 (D.C. Cir. 1994); *Project Sentinel v. Evergreen Ridge Apartments*, 40 F.Supp.2d 1136, 1140 (N.D.Cal. 1999).

creates standing. The decision holds that the defendant's conduct must *impair* or *injure* the organization's activities. The Supreme Court quite clearly stated that if Havens Realty's steering practices impaired HOME's ability to provide counseling and referral services, then that impairment would be "injury in fact." *Havens Realty*, 455 U.S. at 379. Further, in footnote 21, the Court affirmed that *at trial*, the organization would have to demonstrate that it suffered "*impairment* to its role in facilitating open housing" before it would be entitled to judicial relief. *Id.* at 379 n.21 (emphasis added). While impairment of an organization's activities might constitute injury in fact, and diversion or allocation of resources might be a manifestation of that injury, the court did not hold that mere diversion or allocation of resources, without more, is itself injury in fact. This is the question that has bedeviled the lower courts ever since.

In this case, both the district court and the Court of Appeals relied on *Havens Realty* as support for their conclusion that FHOM has standing. (See App. 9, 34.) However, neither court considered whether Mr. Combs' alleged misconduct had an impact on FHOM's activities other than by FHOM's decision to direct some of its resources to investigation and litigation.

C. The Circuits Are Divided as to Whether an Organization May Establish First Party Standing Solely by Its Voluntary Decision to Expend Resources to Investigate Complaints or Pursue Litigation

There is a sharp dispute among the Circuit Courts as to whether Article III standing can be created by an organization's own voluntary decisions to investigate

complaints or pursue litigation. This division has been recognized by both the Circuit Courts and by commentators. See, e.g., *Fair Employ. Council v. BMC Marketing Corp.*, 28 F.3d 1268, 1277 (D.C. Cir. 1994); *Fair Housing Council v. Montgomery Newspapers*, 141 F.3d 71, 79 n.6 (3rd Cir. 1998); *Cent. Ala. Fair Housing Center v. Lowder Realty*, 236 F.3d 629, 642 (11th Cir. 2000). See also, Dash T. Douglas, *Standing on Shaky Ground: Standing under the Fair Housing Act,* 34 Akron L. Rev. 613, 626-629 (2001); Michael E. Rosman, *Standing Alone: Standing Under The Fair Housing Act*, 60 Mo. L. Rev. 547, 593-596 (1995).

The D.C. Circuit has taken the strictest view of the proper basis for organizational standing under *Havens Realty*. In *Fair Employ. Council v. BMC Marketing Corp.*, 28 F.3d 1268 (D.C. Cir. 1994), a fair employment organization sued an employment agency (BMC) for failing to give referrals to black testers while white testers with comparable credentials received referrals. The Fair Employment Council alleged that BMC's discriminatory actions interfered with its efforts to promote enforcement of the civil rights laws, and required it to expend resources to counteract the defendant's alleged discrimination. *Id.* at p. 1276. The court rejected the Council's argument that diverting resources to testing constituted injury in fact that could be fairly traceable to the defendant's conduct.

> [W]e explicitly reject the Council's suggestion that the mere expense of testing BMC constitutes "injury in fact" fairly traceable to BMC's conduct. The diversion of resources to testing might well harm the Council's other programs, for money spent on testing is money that is not spent on other things. But this particular harm is self-inflicted; it results not from any actions taken by

> BMC, but rather from the Council's own budgetary choices. Indeed, it is not really a harm at all; assuming that BMC's actions did not have any *other* effect on the Council's programs independent of its efforts to increase legal pressure on possible open housing violators, the Council and its programs would have been totally uneffected if it had simply refrained from making the reallocation. One can hardly say that BMC has injured the Council merely because the Council has decided that its money would be better spent by testing BMC than by counseling or researching.

Id. at 1276-1277. See also, *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990) ("An organization cannot, of course, manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit. Were the rule otherwise, any litigant could create injury in fact by bringing a case, and Article III would present no real limitation."); *National Treasury Employees Union v. U.S.*, 101 F.3d 1423, 1429 (D.C. Cir. 1996) ("Frustration of an organization's objectives 'is the type of abstract concern that does not impart standing' "). Mr. Combs submits that the D.C. Circuit's interpretation of *Havens Realty* as set forth in the *BMC Marketing* case is legally correct in light of Constitutional doctrine on this issue.

The Third and the Fifth Circuits have taken a more middle ground approach. Both Circuits have issued opinions questioning the ability of an organization to bootstrap standing by its own actions. Those Circuits have held that litigation or legal counseling expenses without more are insufficient to confer standing, but devoting resources to counteract the defendant's alleged discrimination may be sufficient. In *Association for Retarded Citizens of Dallas v.*

Dallas County Mental Health, 19 F.3d 241 (5th Cir. 1994), an advocacy organization (aptly called "Advocacy, Inc.") brought suit under the Fair Housing Act against a neighborhood association and various county entities. The organization claimed that it suffered injury in fact because it had to direct some of its resources to challenging the defendants' allegedly wrongful actions. The Fifth Circuit disagreed:

> The mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization. Advocacy, Inc.'s argument implies that any sincere plaintiff could bootstrap standing by expending its resources in response to actions of another. . . . Advocacy, Inc. and similar groups have no legally-protected interest in not expending their resources on behalf of individuals for whom they are advocates, at least where the only resources "lost" are the legal costs of the particular advocacy lawsuit.

Id. at 244. The court correctly recognized that there can be no injury unless and until a "legally-protected interest" of the plaintiff is violated. See *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 771 (2000) (the Article III judicial power exists "only to redress or otherwise to protect against injury *to the complaining party*") (citing *Warth v. Seldin*, 422 U.S. at 499).

Likewise, in *Association of Community Organizations v. Fowler*, 178 F.3d 350 (5th Cir. 1999) the Fifth Circuit held that devoting resources to litigation does not impart standing.

> An organization cannot obtain standing to sue in its own right as a result of self-inflicted injuries, i.e., those that are not "fairly traceable to the actions of the defendant". [Citation omitted.] Thus, it is immediately clear that ACORN's allegations of injury in fact due to resources it has expended bringing this . . . litigation fail to demonstrate ACORN's standing.

Id. at 358. The Court held that an organization's decision to spend its resources on litigation to counteract the effects of discrimination on a third party is entirely voluntary and therefore the causation element of the standing test is not satisfied. *Id.* at 358-359.

Although the Fifth Circuit has held that an organization may not bootstrap standing based on self-inflicted injuries, at least with respect to litigation expenses, it has also held that an organization that expends resources counteracting the adverse effects of discrimination may have standing. *Id.* at 360-361. See also *Louisiana ACORN Fair Housing v. LeBlanc,* 211 F.3d 298, 305 (5th Cir. 2000), *reh'g denied*, 224 F.3d 767, *cert. denied*, 532 U.S. 904 (2001). This distinction is not entirely clear in the Fifth Circuit's decisions, but it only makes sense if the organization is expending its resources to counteract the adverse effects of the discrimination *on the organization itself.* This was recognized by the D.C. Circuit in *Fair Employ. Council v. BMC Marketing*, 28 F.3d at 1277: "To be sure, the Court [in *Havens Realty*] did mention the 'drain on the organization's resources'. Yet this drain apparently sprang from the need to 'counteract' the defendant's assertedly illegal practices, and thus was simply another manifestation of the injury. . . ." See also, *National Treasury Employees Union v. U.S.*, 101 F.3d at 1429-1430 (mere conflict between an organization's goals and defendant's conduct

does not impart standing – the defendant's conduct must also make the organization's activities more difficult).

The Third Circuit has taken a similar approach. In *Fair Housing Council v. Montgomery Newspapers*, 141 F.3d 71 (3rd Cir. 1998), a fair housing organization (FHC) argued that it had standing because the defendants' alleged misconduct forced it to divert resources from counseling and other activities to (1) an educational campaign to counteract the discriminatory effect of defendants' advertisements, (2) an investigation into discrimination in advertising, and (3) litigation. The Court sided with the approach of the D.C. Circuit as set forth in the *Spann* and *BMC Marketing* (discussed above) and held that "pursuit of litigation alone cannot constitute an injury sufficient to establish standing under Article III." *Id.* at 79-80.

A more recent decision from the Third Circuit, *Alexander v. Riga*, 208 F.3d 419 (3d Cir. 2000), *cert. denied*, 531 U.S. 1069 (2001) held albeit without much discussion that a fair housing organization that "stopped everything else" to devote attention to the lawsuit, and that diverted resources to investigate and counter discrimination, had standing, apparently because the discrimination impaired the organization's ability to carry out its mission. *Id.* at 427 n.4. The *Alexander* decision was decided by the same judge who authored *Fair Housing Council v. Montgomery Newspapers* two years earlier, but the *Alexander* decision does not reconcile or even reference that decision. The Third Circuit may be drawing a distinction between standing based on pre-litigation efforts to counteract discrimination and standing based on the litigation itself. Logically, the distinction does not hold water, since both of these "injuries" are self-directed unless taken to counteract

the effect of the discrimination *on the organization itself*, in which case they are both simply manifestations of the injury that those practices had inflicted upon the organization.

The Second, Sixth, Seventh and Ninth and Eleventh Circuits have taken the most liberal approach, and have concluded that an organization that voluntarily directs its resources toward investigating discriminatory conduct or pursuing litigation has established the necessary "injury in fact" to support standing. By and large, these decisions include no analysis of the issue presented here, and rely on short excerpts from *Havens Realty*. A typical example is *Village of Bellwood v. Dwivedi*, 895 F.2d 1521 (7th Cir. 1990) which is frequently cited as support for the liberal approach. In that case, the Court states in a rather off-the-cuff manner that "*Havens* makes clear, however, that the only injury which need be shown to confer standing on a fair-housing agency is deflection of the agency's time and money from counseling to legal efforts directed against discrimination." *Id.* at 1526. See also, *Chicago v. Matchmaker Real Estate Sales Center*, 982 F.2d 1086, 1095 (7th Cir. 1992) (same); *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 905 (2d Cir. 1993) (same); *Hooker v. Weathers,* 990 F.2d 913, 915 (6th Cir. 1993) ("FHCS devoted resources to investigating the defendants' practices and alleges that it has confirmed that defendants do discriminate on the basis of familial status. Therefore, FHCS has standing."); *Arkansas ACORN Fair Housing v. Greystone Development*, 160 F.3d 433, 434 (8th Cir. 1998) (" . . . the deflection of an organization's monetary and human resources from counseling or educational programs to legal efforts aimed at combating discrimination, such as monitoring and investigation, is itself sufficient to constitute

an actual injury. . . . "); *Cent. Ala. Fair Housing Center v. Lowder Realty*, 236 F.3d 629, 642 (11th Cir. 2000) ("Where a fair housing organization expends resources as a proximate result of the defendant's discriminatory conduct, and those resources would have been devoted to other activities consonant with its mission were it not for the offending conduct, it suffers injury . . . . ").

The *Lowder Realty* case is interesting because it does give the standing issue some considered analysis, although in the context of discrimination against testers. See *Lowder Realty*, 236 F.3d at 641-643. The court states:

> [W]e do not agree with the defendants that allowing the Center to seek damages, on this record, based on discrimination toward its testers is the equivalent of permitting the Center to "create its own injury." There is an obvious difference between the situation highlighted by defendants – where an organization manufactures the injury necessary to maintain a suit by expending resources on that very suit – and the situation where an organization incurs diversion of resources and frustration of purpose damages as a result of specific documented incidents of unlawful discrimination toward its testers. In the latter situation, the organization is clearly not seeking or inflicting its own injury; the injury is inflicted by the defendants.

Id. at 642. However, the court fails to acknowledge that an organization's decision to test an alleged discriminating landlord is just as voluntary as the decision to pursue litigation against the landlord. And, siding with the Second and Seventh Circuits, the court misconstrued *Havens Realty* as holding that "the identification and

combating of discrimination [i]s a 'concrete and demonstrable' injury, which could cause a drain on organization resources" and thereby gives rise to standing. *Id.*

The rule adopted by these decisions cannot be reconciled with the actual holding and analysis of *Havens Realty,* which is that standing requires some injury to the organization itself, which may be manifest through investigation or litigation. *Havens Realty* did not hold that the investigation or litigation of discrimination against a third party are *themselves* injury in fact without proof that the defendant's conduct directly impaired the organization's activities. Nor can these decisions be reconciled with the causation requirement. For if the investigation or litigation is self-directed by the organization in response to alleged discrimination against a third party that has no effect on the organization, it cannot meaningfully be said that the alleged discrimination was a cause of the organization's injury.

D. This Issue is Recurring and of Great Practical Importance

This issue has fundamental significance to fair housing organizations, tenants and housing providers nationwide. The importance of this issue is reinforced by FHOM's amici in the Ninth Circuit. No less than 22 fair housing and civil rights advocacy organizations joined in a brief supporting FHOM's request for a broad interpretation of the Article III standing requirement. Those amici were headed by the National Fair Housing Alliance, a private non-profit corporation located in Washington, D.C. comprised of more than 90 private fair housing organizations throughout the United States.

These amici sought clarification of the application of *Havens Realty* in the Ninth Circuit, and acknowledged that this was an issue of first impression for that court. These amici expressed concern that unnecessary resources were being spent on litigating the standing issue: "Rather than focusing on the substantive merits of discrimination claims, housing providers have converted the issue of fair housing organization standing into a cottage industry of satellite ligation within fair housing cases." They told the court:

> Clarifying how the *Havens* decision should be applied in fair housing cases will achieve judicial economy by reducing the amount of time district courts spend on standing issues; will reduce the cost of litigating this issue for the parties; and also will serve the public interest by clarifying the expectations of parties to fair housing disputes, thereby facilitating out-of-court settlement.

FHOM's amici also pointed out in a footnote that clarification of *Havens Reality* is "particularly important . . . because the existence of standing is fundamental to the court's subject matter jurisdiction, is outcome-determinative if the ruling goes against the complainant, and may be revisited multiple times in any one case." Standing is, of course, a threshold question in every federal case so it comes up regularly, and is recurring. This issue has been litigated in numerous cases, which tends to show the law is unsettled and unclear.

Clarification of this issue is also important because fair housing organizations frequently act as watchdogs to further enforcement of the Fair Housing Act and the public interest in open housing. See *Trafficante v. Metropolitan*

Life Ins. Co., 409 U.S. 205, 211 (1972). However, this salutatory purpose can only go so far with respect to standing. It is well established that Congress may not abrogate the minimum constitutional requirements of injury in fact, causation and redressability. *Gladstone Realtors v. Village of Bellwood,* 441 U.S. 91, 100 (1979) ("In no event, however, may Congress abrogate the Art. III minima: a plaintiff must always have suffered 'a distinct and palpable injury to himself' . . . ."). Thus, a fair housing organization cannot bring suit under the Act unless it has experienced actual injury in its own right, and it is important that these organizations know what the pleading and proof requirements are to establish standing.

Besides fair housing organizations, the United States also is interested in this dispute as shown by its amicus curiae brief in support of FHOM. That brief points out the United States has an interest in ensuring the availability of "private enforcement actions, consistent with the statute and the Constitution." Resolution of this split of authority is important for administrative law judges who conduct hearings under sections 3610 and 3612 of the Fair Housing Act. See Rosman, *Standing Alone: Standing Under The Fair Housing Act*, 60 Mo. L. Rev. at 594-595 and n.90. The split of authority also has implications for government agencies that administer programs at a national level. (Particularly HUD, which issues grants to fair housing organizations under the Fair Housing Act. See 42 U.S.C. 3616a.[5]) The agencies favor uniformity so

[5] Section 3616a permits the Secretary of Housing and Urban Development to make grants and enter into contracts with fair housing

(Continued on following page)

that similarly situated individuals are treated the same and because it simplifies administration of their programs. Not surprisingly the courts oppose agency non-acquiescence. See, e.g., *Rogers v. Chater*, 118 F.3d 600, 602 (8th Cir. 1997) (holding Commissioner of Social Security Administration's policy of non-acquiescence with circuit law to be "flagrantly unlawful").

This issue also affects housing providers. The California Apartment Association submitted an amicus brief in support of Mr. Combs. The nature of CAA's interest is to promote fairness in the rental of residential housing while also encouraging and ensuring the equitable enforcement of fair housing laws only by appropriate parties who have standing under Article III. In fact, landlord tenant relations are notoriously volatile. It is not uncommon for tenants to lodge complaints that have no merit, often for ulterior motives, such as if they are being evicted for non-payment of rent or other legitimate reasons (as were the complaining tenants here). Later, they are not willing to pursue any legal remedy. However, if the fair housing organization that receives the complaint then goes out and investigates, under the rule advocated by FHOM, the organization now has standing to sue, and the landlord is left facing a lawsuit by a party who has no real interest in the suit except as an advocate for social policy.

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organizations for investigation and enforcement activities, including "testing and other investigative activities" and "litigation." See section 3616a(b). This also begs the question, how can a fair housing organization claim "injury in fact" for spending grant money from HUD on these activities?

Finally, this issue has importance even beyond the fair housing arena, since it concerns the basic standing requirements of Article III. Notably, several of the amici who supported FHOM are not fair housing organizations, but civil rights organizations, including Protection & Advocacy Inc. and the Disability Rights Education Defense Fund.

E. This Case Squarely Presents the Issue that has Divided the Circuit Courts

This issue is squarely presented by the facts of this case. FHOM asserts that it has standing because it directed resources to the investigation of Mr. Combs and subsequent prosecution of this lawsuit. FHOM also claims standing based on the need for "outreach" to counteract Mr. Combs' alleged discrimination. (This may be thought of as a future diversion of resources.) However, FHOM's proof shows that these actions were undertaken voluntarily by FHOM in response to complaints against Mr. Combs. There was no evidence of any actual injury or impairment to FHOM's activities besides FHOM's voluntary allocation of resources to these efforts. FHOM's activities were taken as the result of third party complaints, not as the result of any injury or threat of injury to FHOM itself. Hence, the basic question is presented – may FHOM, by its own voluntary actions, establish standing to sue Mr. Combs in the absence of any actual injury or impairment to FHOM as the result of the alleged misconduct.

F. The Rule Adopted by the Ninth Circuit is Simply Wrong

The broad interpretation of *Havens Realty* adopted by the Ninth Circuit and others is erroneous because it would

enable fair housing organizations, or any other person or entity for that matter, to create standing of their own volition by simply deciding to investigate a housing provider. If this were the rule, then the exercise of federal jurisdiction would be "gratuitous and thus inconsistent with the Art. III limitation." *Gladstone Realtors v. Village of Bellwood,* 441 U.S. at 99 (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)). Indeed, such a rule would effectively abolish the standing requirement for fair housing organizations (and other advocacy organizations), contrary to Constitutional doctrine. See *Sierra Club v. Morton,* 405 U.S. 727, 739-740 n.16 (1972).

Furthermore, an organization's abstract concern about a social policy matter that may be affected by litigation fails to substitute for the concrete injury required under Article III. An organization should not be permitted to turn its abstract social concern into a concrete injury by the simple expedient of directing resources to the problem, else the Article III requirement has no meaning. See *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 38-39 and n.16 (stressing importance of the plaintiff's personal stake in litigation). The D.C., Third and Fifth Circuits have explicitly recognized this problem and interpreted *Havens Realty* to account for it. The other Circuits have more or less ignored it, as did the district court and the Court of Appeal in this case.

The evidence here is that FHOM is funded with government grants and other money for the specific purpose of investigating, counseling and prosecuting discrimination. FHOM has no legally protected interest in not expending its resources for the very purposes those resources were intended. See *Lujan v. Defenders of Wildlife,* 504 U.S. at 560 (injury in fact is an invasion of a "legally protected

interest"); *Assoc. for Retarded Citizens v. Dallas County Mental Health*, 19 F.3d at 244. Thus, causation, the second element necessary for standing, is lacking here also.

FHOM did not present any evidence that its expenditures were necessary to counter the effects of Mr. Combs' alleged discrimination *on FHOM's work*. Nor was there any evidence establishing the need to counteract Mr. Combs' alleged discrimination on the public in general – the only evidence that FHOM presented regarding its alleged "outreach damages" was its Executive Director's speculative declaration that states outreach "may" be necessary to locate and counsel individuals who "may" have been affected by the alleged discrimination, or who "may" have formed the mistaken impression that discrimination is legal. (ER 163, 165.) There was no evidence whatsoever that Mr. Combs' alleged misconduct had any impact on "the Marin Housing Market."

FHOM also failed to submit any evidence of causation other than evidence that it investigated third party complaints about Mr. Combs. There was no evidence that Mr. Combs' alleged misconduct had any effect at all on FHOM. This is not surprising since Mr. Combs had one 18 unit apartment building in a county which had, according to FHOM's own analysis in 1994, a total of 37,433 rental units. Given this statistic, it is difficult to believe that Mr. Combs' alleged misconduct caused a concrete and particularized, and actual or imminent, invasion of a legally protected interest held by FHOM, and in fact FHOM submitted no evidence of such injury. Even Justice Brennan, in *Havens Realty*, recognized that it was "implausible" that discrimination within an single housing complex might give rise to a "distinct and palpable injury"

throughout a metropolitan area or county. See *Havens Realty*, 455 U.S. at 377.

CONCLUSION

The Court should take up this matter to clarify whether a fair housing organization may create standing by voluntarily directing its resources to investigating or pursuing litigation against a housing provider, in the absence of any evidence that the housing provider's alleged conduct injured or impaired the organization's activities other than the direction of resources. This question is of fundamental importance to fair housing organizations, housing providers, government agencies, and the public. The time is ripe to address this issue, in this case, and resolve the split among the Circuit Courts.

Therefore, this petition ought to be GRANTED.

Respectfully submitted,

MICHAEL K. JOHNSON, ESQ.
Counsel of Record
LEWIS BRISBOIS BISGAARD
& SMITH LLP
One Sansome Street, Suite 1400
San Francisco, CA 94104
Telephone: 415-362-2580
Attorneys for Petitioner
Jack Combs